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SUPREME COURT OF THE UNITED STATES.

MARY LOIS McINTOSH,
Petitioner,
vs.
ELLA L. WIGGINS,
Respondent.

No. 915

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF AND ARGUMENT.

PAUL BAKEWELL, JR.,
St. Louis, Missouri,
Counsel for Petitioner.

With Him on Brief:
JOHN E. CRAMER, JR.,
CLAUDE I. BAKEWELL,
St. Louis, Missouri.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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No. .....

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mary Lois McIntosh, respectfully petitions this Court to grant a writ of certiorari to review the final decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, sitting in Equity, in the case of Mary Lois McIntosh vs. Ella L. Wiggins, 123 Fed. (2d) 316.

The judgment below was rendered October 29, 1941. A dissenting opinion was filed.

A petition for rehearing was denied on November 26, 1941.

A motion to vacate the judgment because of a supervening decision by the Supreme Court of Missouri was denied on January 6, 1942.

Italics throughout are ours.

SUMMARY STATEMENT OF MATTERS INVOLVED.

In 1923 the Supreme Court of Missouri construed the will of John E. Liggett of Missouri on a single issue in a suit filed by his three daughters, that issue being—whether his three daughters had each taken a mere life tenancy, or whether they held absolute estates, which they claimed in property worth several millions of dollars.

The said Supreme Court decided that each had merely a tenancy for her life in one-third (⅓) of the property, and that the estates in remainder—then prospective—were contingent. It directed an affirmance of such a ruling.

Its opinion stated that the testator intended that if a daughter should die without issue her one-third (⅓)

> "shall go to the survivors of my said daughters in equal portions for life, with remainders over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes" (271 S. W., p. 827; Phys. Ex., p. 104).

Thereafter one daughter, Mrs. Fowler, died without issue. The two other daughters, Mrs. Kilpatrick and Mrs. Wiggins, survived her.

On August 10, 1928 Mrs. Kilpatrick died and left two *heirs of her body,* Mary Lois McIntosh, a daughter, Petitioner here, and Elizabeth Liggett Kennard.

They then claimed the equal portion of the Fowler one-third (⅓), being the one-sixth (⅙) interest which, on the death of Mrs. Fowler, had passed to Mrs. Kilpatrick for her life, and which was to vest on her death in the heirs of her body, a one-twelfth (1/12) interest in each.

But a paragraph of the decree of the trial Court, which remains of record, *in the same case,* contradicts the above quoted statement in the opinion of the Supreme Court of Missouri.

Said paragraph of the decree purports to deprive the heirs of the body of Mrs. Kilpatrick of said one-sixth (⅙) interest by purporting that the same one-sixth (⅙) interest should pass to her sister, Mrs. Wiggins (Respondent here) for her life, as successor life tenant, and that the remainder interest therein shall vest hereafter on the death of Mrs. Wiggins and shall then vest in contingent remaindermen who are not now ascertainable.

The two heirs of the body of Mrs. Kilpatrick, Petitioner and Elizabeth Liggett Kennard, claimed the said one-sixth (⅙) under the will and under the opinion of the Supreme Court of Missouri.

Mrs. Wiggins, Respondent, claimed the same one-sixth (⅙) under the decree of the trial Court in the same case, which contradicted the express statement above quoted by the Supreme Court.

Respondent expressly admits that the said one-sixth (1/6) interest passed to Dolly L. Kilpatrick for her life. Respondent expressly admits that Dolly L. Kilpatrick left surviving two "*heirs of her body*", Petitioner and Elizabeth Liggett Kennard (Ans., R., p. 20). But Respondent claims the said one-sixth (1/6) adversely to the two heirs of her sister's body.

Under the will the rights of those two are identical.

In the Courts of Missouri, Elizabeth Liggett Kennard has won her share. In the Federal Courts, the Petitioner has been denied her share.

In a separate but companion suit brought by Elizabeth Liggett Kennard against Mrs. Wiggins in the Courts of Missouri, the Supreme Court of Missouri in 1941 specifically ruled:

> "Hence when Dolly L. Kilpatrick died the ⅙ interest that came to her upon the death of her sister Cora B. Fowler, vested in her daughter, Mary Lois Perry, now Mary Lois McIntosh, and the present plaintiff [Eliza-

beth Liggett Kennard], 1/12 interest in each'' (R., p. 361).

In that case the Supreme Court of Missouri adjudged that Elizabeth Liggett Kennard recover her one-twelfth (1/12) from Mrs. Wiggins. (Opinion of Supreme Court of Missouri, R., p. 356).*

In the *Kennard* case the Supreme Court of Missouri, in 1941, stated that in the original case it had not ruled upon said paragraph of said decree (R., p. 361); that such paragraph was wrong (R., p. 363); and that it had been the result of fraud and that it amounted to a constructive fraud upon the rights of Mrs. Kennard (R., p. 370).

That opinion also sets out the statements and omissions of counsel in the original suit, which were the effective cause of the paragraph of the decree remaining on the record (Opinion of the Supreme Court of Missouri, R., p. 356).

In the *Kennard* case the Supreme Court of Missouri said:

> ''* * * to refuse redress in the present case 'would be a reproach to the administration of justice' '' (R., p. 370).

In this companion case by Mary Lois McIntosh, of Connecticut, against Mrs. Wiggins, of Missouri, brought in the Federal Court by reason of diversity of citizenship, the majority of the Court below accepts the ruling by the Supreme Court of Missouri that under the will the one-twelfth (1/12) interest belongs to Petitioner, but denies her the recovery of the same and permits Mrs. Wiggins to hold it.

A dissenting opinion in the Court below by Circuit Judge

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*On December 16, 1941, the Supreme Court of Missouri overruled a petition for a rehearing.

On December 26, Mrs. Wiggins filed a further petition for a rehearing, and a motion to transfer to the Court in Banc. At the time of writing this the Court has not acted upon the same, but the Rules of that Court prohibit the filing of more than one petition for rehearing. Under the Constitution of Missouri, there is now no ground upon which the cause may be transferred to the Court in Banc.

Johnsen said that the Supreme Court of Missouri had clearly branded the paragraph

> "* * * as unconscionable and as a legal perversion. * * * that a gross injustice has been perpetrated, apparently inadvertently, by an unconscionable decree and one legally indefensible * * *."

It further said:

> "There necessarily is a legitimate clamor for a remedy, as a matter of elemental justice and public respect for the courts" (R., p. 299).

We present this petition for certiorari not only in the interest of Mrs. McIntosh, the other remainderman, whose rights are identical with those of Mrs. Kennard, to whom the Supreme Court of Missouri awarded judgment, but also in the interest of elemental justice and public respect for the Courts as instruments of Justice.

The strange situation in which one paragraph of a decree contradicted the statements in the opinion of the Supreme Court in the same case, but where the Court records contained an order of affirmance, affects the title to real estate in Missouri and has necessarily resulted in much litigation.

A mere statement of the ruling below will not suffice without a reference to such previous litigation. Therefore, such litigation will be briefly described here.

THE ORIGINAL SUIT IN WHICH THE DECREE CONTRADICTED THE STATEMENTS IN THE OPINION.

John E. Liggett had three daughters, Cora B. Fowler, Ella L. Wiggins and Dolly L. Kilpatrick. Under his will each of them held an estate for her life in an undivided one-third (⅓) interest in certain property.

They filed a suit in the Circuit Court of Missouri, referred to in this record as "the will construction suit."

They claimed that each of them owned an absolute estate in one-third (⅓) of the property, as distinguished from a mere tenancy for her life.

They included as defendants in said cause Mary Lois McIntosh and Elizabeth Liggett Kennard, and both were served with summons and a copy of the petition.

Petitioner did not appear, and filed no pleading to the petition by which her mother and her two aunts sought to have adjudicated the issue as to whether each of them took an absolute estate in fee or a mere life estate.

Neither Mrs. Kilpatrick nor Mrs. Wiggins claimed any interest in the Fowler one-third (⅓). On the contrary, they alleged that Mrs. Fowler owned the same absolutely.

The Circuit Court denied the claim of the daughters to absolute estates and ruled that they took life estates only with contingent remainders over to the heirs of their bodies, respectively, and directed counsel to draft a decree.

The decree so drawn covers 57 printed pages (Phys. Ex., p. *223).

In preparing such decree for the Circuit Court, counsel for the guardian ad litem of a minor and counsel for Mrs. Wiggins agreed upon the paragraph written into the decree, which paragraph contradicted the will with regard to the future devolution if a daughter should die without issue (Phys. Ex., p. *522).

On appeal, counsel did not advise the Supreme Court of the presence of said paragraph (R., p. 369) and the Supreme Court later said that the briefs would suggest that "no such construction had been made" and that "no judge, by reading the briefs *would even suspect* that such a construction * * * had been made" (R., p. 366).

Mrs. Wiggins and her two sisters appealed the suit to the Supreme Court of Missouri. That Court said in its opinion:

"The trial court held that the will created life estates

only in the three daughters, with contingent remainders over in their bodily heirs, and *entered a decree accordingly.* From that decree the daughters duly appealed the case to this court, and *the single question they now present is whether that ruling is correct, or not"* (271 S. W., p. 821; Phys. Ex., p. 84).

The Supreme Court decided that *such ruling* had been correct and directed an order of affirmance.

As a reason for its decision the Supreme Court said in its opinion that if a daughter should die without issue, the testator intended her portion

> "shall go to the survivors of my said daughters in equal portions for life, with remainders over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes" (271 S. W., p. 827; Phys. Ex., p. 104).

That opinion was rendered in 1923.

A DAUGHTER DIES WITHOUT ISSUE.

Years later a daughter, Mrs. Fowler, died without issue. Her two sisters survived her. Thereupon an equal portion of the Fowler one-third (⅓), or a one-sixth (⅙) interest, passed to her sister, Dolly L. Kilpatrick, for her life, with remainder over to the heirs of her body.

On August 10, 1928 Dolly L. Kilpatrick died and left two heirs of her body, Petitioner here, and Elizabeth Liggett Kennard.

Under the will and under the opinion of the Supreme Court, each of them took an undivided one-twelfth (1/12) interest absolutely, but Mrs. Wiggins claimed the said entire one-sixth (⅙) interest.

She asserted that the paragraph of the decree of the Circuit Court in the will construction suit gave it to her, and that such decree had been affirmed.

But the paragraph of the decree of the Circuit Court was flatly contrary to the statement in the opinion of the Supreme Court.

AN ACTION TO TRY TITLE TO REAL ESTATE.

Petitioner, under her then name, Mary Lois Perry, filed a suit against Ella L. Wiggins in the Federal Court at St. Louis, which was an action at law to try title to certain real estate.

Petitioner claimed under the will of her grandfather.

Mrs. Wiggins, Respondent here, pleaded as a defense the decree of said Circuit Court of St. Louis in the will construction suit and the order of affirmance by the Supreme Court of Missouri as res adjudicata and as an estoppel.

The Federal Court sustained the said State decree in the will construction suit as valid and binding. It expressly declined to determine the title and based its judgment solely upon the said State decree in the will construction suit.

Its judgment said in part:

> "That the premises considered, the Court holds and adjudges: that as between the parties hereto, the said decree of the Circuit Court, City of St. Louis [in the will construction suit] * * * was and is res adjudicata * * *; that the title, rights and interest of defendant [Ella L. Wiggins, the Respondent here] * * * and of the plaintiff [Mary Lois McIntosh, Petitioner here] are as the same were adjudged to be in the said decree construing said will * * *" (Phys. Ex., p. *538).

On appeal, the Court of Appeals for the Eighth Circuit affirmed that judgment on a matter of procedure (57 Fed. (2d) 622).

In that cause the District Court expressly declined to determine the title under the will (Phys. Ex., p. *532).

The Court of Appeals did not determine the title under the will.

That action at law was ended in 1932.

A MOTION FOR A NUNC PRO TUNC ENTRY IN THE ORIGINAL WILL CONSTRUCTION SUIT.

Thereafter, Petitioner and Mrs. Kennard joined in a motion in the State Court for a nunc pro tunc order correcting the unjust paragraph in the decree in the will construction suit, contending that under the judgment of the Supreme Court of Missouri in said suit the contingent remainders had vested in them in 1928, on the death of Dolly L. Kilpatrick.

The Supreme Court of Missouri then held that in the will construction suit it had not specifically ruled upon the paragraph, which purported to adjudge the devolution of the share of a daughter who might die without issue. *Wiggins v. Perry,* 119 S. W. (2d) 839 (R., p. 73).

A SEPARATE EQUITY SUIT BY ELIZABETH LIGGETT KENNARD.

Then Mrs. Kennard submitted to the State Courts of Missouri her separate action in Equity to recover her one-twelfth (1/12) interest. The opinion of the Supreme Court of Missouri in said cause was rendered in 1941 and establishes:

1) That "in the will construction suit the three daughters [of the testator] had contended that under the will they took a fee interest instead of a life estate" and that in said cause the trial Court had "held that they took a life estate only," and that the future interests were contingent remainders, and that such ruling had been "affirmed" by the Supreme Court of Missouri (R., p. 357).

2) That the decree in said suit had purported to adjudge

the devolution of a future contingent interest if a daughter should die without issue (R., p. 358).

3) That in the will construction suit, the Supreme Court itself had not ruled upon the then prospective devolution of the share of a daughter who might die without issue (R., p. 366).

4) That the proof showed that in the will construction suit counsel had not advised the Supreme Court as to the existence of said paragraph in the decree, but that to the contrary the briefs of all counsel had stated:

> "the intention of the testator to be that if a daughter should die without issue, her one-third (⅓) should pass in equal portions to her surviving sisters for life, with remainders over to the heirs of their respective bodies" (R., p. 370).

(The opinion quotes such statements as made by each of said counsel, including counsel for Respondent here. R., pp. 364-5.)

5) "That no judge, by reading the briefs in the will construction suit appeal, would even suspect such a construction as that contained in the paragraph of the decree" (R., p. 366).

6) That "the briefs [in said suit] would suggest that no such construction was [had been] made" (R., p. 366).

7) That "no point was [had been] made as to the correctness of such construction" (R., p. 366).

8) That the "paragraph was in the will construction suit decree, and that" the Supreme Court itself had "affirmed that decree," but that the "attention" of the Supreme Court had not been "directed" to said paragraph (R., p. 363).

9) That the paragraph of said decree was wrong (R., p. 361).

10) That it was not "tenable" and that "no word juggling as to remainders" could "in reason reach such result" (R., p. 363).

11) That the challenged paragraph had been the result of fraud and that "under the facts" the challenged paragraph "amounted to a constructive fraud upon the rights" of Mrs. Kennard, and by such fraud the Court meant "representations which cause injury to another, although the party making the representations did not intend to deceive" (R., p. 370).

12) That under the will the one-sixth (1/6) interest here involved, which had passed to Dolly L. Kilpatrick for her life had, upon her death, vested absolutely in Mary Lois McIntosh, Petitioner here, and in Elizabeth Liggett Kennard, a one-twelfth (1/12) interest in each (R., p. 361).

13) That Elizabeth Liggett Kennard should recover her property, together with all income derived therefrom since August 10, 1928 (R., p. 371).

A SEPARATE EQUITY SUIT BY MARY LOIS McINTOSH.

The instant case in Equity by Mary Lois McIntosh, a resident of Connecticut, against Mrs. Wiggins, a resident of Missouri, was in the Federal Court because of the diversity of citizenship and was submitted upon the same documentary proof as was used in the *Kennard* case—the printed record and briefs in the will construction suit.

THE MAJORITY OPINION BELOW.

In direct conflict with the decision of the Supreme Court of Missouri and disregarding the express Findings of Fact and Conclusions of Law expressed by the Supreme Court

of Missouri, the majority of the Court below ruled that the paragraph in the decree in the will construction suit was valid and binding.

The majority below accept the ruling by the Supreme Court of Missouri that the decree was wrong, and therefore admit that Petitioner in 1928 became the owner of the property sued for.

But sitting in Equity, the majority below give to Respondent full benefit of a State decree, which the State law has adjudged to be wrong, and to have resulted from fraud.

The majority below said in its opinion:

> "it is to be noted that that court [the Supreme Court of Missouri] does not hold that it [the decree] was procured by fraud, accident or mistake, * * * (R., p. 298).

That opinion was rendered October 29, 1941.

On December 16, 1941 the Supreme Court of Missouri, of its own motion, modified its opinion in the *Kennard* case and stated:

> "However, as we see it, the challenged paragraph in the will construction suit, under the facts, amounted to a constructive *fraud* upon the rights of the present plaintiff, a minor defendant in that suit. And by such fraud, we mean representations which cause injury to another, although the party making the representations did not intend to deceive" (R., p. 370).

Petitioner informed the Court below of such explicit ruling subsequently made and moved the Court below to vacate its judgment (R., p. 347).

On January 6, 1942 the Court below denied said motion and permitted its original opinion to stand (R., p. 372).

The majority of the Court below also ruled that Petitioner is barred, as a matter of res adjudicata, by the

previous decision of the Federal District Court in the action at law hereinbefore described (R., p. 294).

It does so notwithstanding the fact that said judgment was a dependent judgment and rested solely upon the State decree, which subsequently has been invalidated by the highest Court of Missouri, and notwithstanding the fact that since the rendition of such judgment at law, as to a matter of local law, a supervening decision by the Supreme Court of Missouri, in direct relation to the matter, has established the local law and has created a new situation.

The majority opinion said:

> "The decision of the Supreme Court of Missouri cannot, in any event, affect in any way the binding force and effect of the judgment of the United States District Court in Perry vs. Wiggins, which this court has affirmed (57 F. 2d 622) and which it may not now ignore. See and compare Deposit Bank vs. Frankfort, 191 U. S. 499" (R., p. 298).

The majority below, as a Court of Equity, gives to Respondent full benefit of a former Federal judgment in an action at law, which judgment is wrong; which does an injustice; and which rests solely upon a paragraph of a State decree, which the highest Court of that State has adjudged to be wrong and has invalidated because of fraud.

The majority opinion below also ruled that Petitioner, an adult at the time of the will construction suit, had not appeared therein and that

> "her own negligence in having failed to appear and defend her rights in that suit was enough to prevent the court below from granting her the relief which she seeks" (R., p. 297).

(We will show in our argument *infra*

a) that under the law of Missouri, Petitioner, at the

time of the will construction suit, had no "rights" which she could have then defended; that she had merely the possibility of acquiring thereafter a contingent interest which was dependent upon contingent events; and that such possibility would not have permitted her to assert any "rights" under the law of Missouri;

b) that under the law of Missouri, Petitioner is entitled to recover; and

c) that in Equity Respondent may not claim the benefits of a decree which is wrong.)

The majority of the Court below ruled:

> "No party and no attorney in that litigation [the will construction suit] owed her [Petitioner] *any* duty with respect to the protection of her *rights*" (R., p. 297).

(We will show in our argument *infra* that such statement tacitly approving the making of erroneous representations by counsel to the Supreme Court of Missouri, which that Court condemned, has so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.)

The majority of the Court below said:

> "the challenged provision of the decree was not questioned in the Supreme Court [of Missouri] by any of the parties to the appeal and *was not an issue on appeal*" (R., p. 296).

The Supreme Court of Missouri has established that in the will construction suit Mr. Kirby, counsel for Mrs. Wiggins, had stated in his brief in the Supreme Court of Missouri the intention of the testator to be that if a daughter should die without issue her one-third (⅓) should pass in equal portions to her surviving sisters for life, with

remainders over to the heirs of their respective bodies (R., pp. 365 and 370) and *had failed to inform the Supreme Court of the paragraph of the decree to the contrary* (R., p. 369).

Mrs. Wiggins did not present to the Supreme Court of Missouri for decision by it the correctness *vel non* of the paragraph of the decree which (in contradiction to the intention of her father's will as stated by her counsel to the Supreme Court) *gave to the surviving daughters successive life estates* (R., p. 24).

The answer filed in the instant case by Mrs. Wiggins through her same counsel expressly avers that Mrs. Wiggins did not wish to have that paragraph *reviewed or altered* (R., p. 33).

Her counsel told the Supreme Court of Missouri that the testator intended the property to go

> "to the survivors of the daughters again with remainders *over to the heirs of their bodies*" (Opinion of the Supreme Court, R., p. 365).

But he did not present to the Supreme Court a paragraph of the decree of the Circuit Court (Opinion of the Supreme Court, R., p. 369) which gave to the survivors of the daughters *successive life estates,* because they did not wish the Supreme Court to review or alter that paragraph (R., p. 366).

Here are the exact words of the answer in this case:

> "inasmuch as the decree of the State Circuit Court had held that if one daughter died without issue, leaving two sisters surviving, the latter would take successive life estates, the daughters (appellants) had no desire to have that provision of said decree reviewed or altered" (R., p. 33).

Notwithstanding those facts, the majority below ruled that because the paragraph had not been questioned in the

Supreme Court and had not been in issue on said appeal, therefore the paragraph, as a part of the decree of the trial Court in the same case, remains valid and binding.

As applied to the facts here, such ruling by the majority below means this: In a suit to construe a will—the sole purpose of which is to give effect to the testator's intention—a paragraph of a decree of the trial Court, which defeats and perverts that intention, is conclusive, because the Appellate Court, which rendered the final judgment in the case, did not rule upon such paragraph, and did not rule upon it because counsel had informed the Appellate Court in their briefs of the true intention of the testator, and had failed to inform that Court that a paragraph of the decree of the trial Court contradicted the testator's true intention as stated by them; and because they had not presented the said paragraph to the Supreme Court, *because they did not wish to have such paragraph reviewed or altered.*

Such ruling was made by the Court below after the Supreme Court of Missouri, which had rendered the final judgment in the will construction suit, had specifically stated:

> "No judge, by reading the briefs in the will construction suit appeal, would even *suspect* such a construction as that contained in the challenged paragraph of the decree" (R., p. 366).

and

> "the briefs would suggest that no such construction was made, * * *" (R., p. 366).

THE DISSENTING OPINION BELOW.

The dissenting opinion below said that the Supreme Court of Missouri had clearly branded the paragraph in the will construction decree "as unconscionable and a legal perversion"; that when Dolly L. Kilpatrick died the one-

sixth (⅙) interest vested in the two heirs of her body; and that the decree to the contrary was indefensible.

It ruled that a gross injustice had been perpetrated; that a legitimate clamor for a remedy followed as a matter of elemental Justice and public respect for the Courts; that the State Courts of Missouri had righted the wrong as to one of the remaindermen, but that the other was being told by the Federal Courts that she was engaged in a futile assault upon the ramparts of res adjudicata; that the paragraph of the decree "had crept into the decree" solely because of a guardian ad litem's pleading and by the insertion of such provision by the attorney for the guardian ad litem in the decree; and that the Supreme Court of Missouri has determined that the act of the guardian ad litem had been in excess of his lawful authority and by mistake of his counsel (R., p. 300).

The minority asked that "the actualities of the situation be dealt with straightforwardly in the interest of elemental justice" (R., p. 301).

The minority opinion below quotes from the Federal judgment in the action at law to try title to real estate and shows that same was dependent upon the State decree, and that plainly it had been simply an adjudication that the rights of the parties had been settled by the prior decree of the Circuit Court of the City of St. Louis, and that a voiding of the latter decree should automatically void the effect of the Federal judgment at law or, at any rate, give the right to declare that judgment nugatory or to allow any pleading amendment necessary to obtain that result (R., p. 301).

QUESTIONS PRESENTED.

1) Whether or not a Federal Court has violated the principle of the finality and supremacy of State decisions as to local law (*Erie R. R. vs. Tompkins,* 304 U. S., p. 78) by holding a decree of a State Court to be res adjudicata,

after the highest Court of that state had ruled that said State decree was wrong, and had specifically decided that such State decree had been the result of fraud and had thereby necessarily and implicitly adjudged such decree to be void?

2) Where, after a Federal decision as to a matter of local law, a supervening decision by the highest State Court in direct relation to the matter creates a new situation and establishes the State law, then whether or not such supervening State decision, as to such local law, should not be given effect by the Federal Court, as opposed to its own prior decision to the contrary with regard to a matter of local law?

3) Whether or not a Federal Court may sustain as res adjudicata a decree of a State Court, which the highest Court of that State has invalidated for fraud?

4) Where in an action at law to determine title to real estate in Missouri, a Federal judgment affirmed by the Court of Appeals for the Eighth Circuit had rested solely upon a decree of a Missouri State Court, and when subsequently the highest Court of Missouri has decided that such basic and underlying State decree had been the result of fraud, and that it had been wrong, then whether or not such decision by the highest Court of Missouri can not affect in any way the Federal judgment, which had rested upon it in a further proceeding between the parties *in the Federal Court, which had rendered the first Federal judgment?*

As a corollary: Whether or not the voiding and vitiation for fraud of such basic and underlying State decree by the highest State Court, does not render nugatory a judgment at law which had been dependent solely upon said State decree and, therefore, require the vacation of the dependent Federal judgment?

5) Whether or not an asserted title to property, which title is founded upon fraud, is not utterly void?

6) Whether or not a Federal Court may give effect to a decree of a State Circuit Court, when such decree appears in a suit filed to give full effect to the intention of the testator, and when such decree defeats the intention of the testator, as stated by the highest Court of the State in the same case in which the decree appears; and whether such a decree is not void as a legal perversion?

7) Whether or not a Federal Court of Equity may hold that a State decree is wrong in that it gives property to one, which property belongs to another; and simultaneously permit such erroneous and unjust decree to shield the one who does not own the property against the claims of the lawful owner thereof?

8) Whether or not a party may be deprived of rights and estates which first vested in her and which she first acquired in 1928, because she did not appear and protect such "rights" in 1923, before she had acquired any rights, when under the law of Missouri such rights could not arise until 1928, and such party had no legal right or standing to contend in Court for any rights prior to the happening of the event which would cause them to arise and vest in her and which event happened in 1928?

9) Whether or not the binding force and effect of a decree in Equity is limited to the matters actually presented to the Appellate Court for decision, and which it intended to decide, and whether in a will construction suit a paragraph of a decree of the trial Court is conclusive, when such paragraph was written by agreement of certain counsel and was not presented to the Appellate Court for decision, and when such paragraph contradicts the intention as stated in the opinion of the Appellate Court and contra-

dicts the intention, as stated to the Appellate Court in the briefs of the very counsel who had caused the paragraph to be inserted, and when the Appellate Court had said that by reading the briefs, no Judge would suspect the presence of such a paragraph in the decree?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I. The direct conflict of decision between the highest Court of Missouri and the Court below, as to a matter of State law, violates the principle of uniformity within a State, established by *Erie R. R. vs. Tompkins,* 304 U. S., pp. 74-77, and defeats the orderly administration of Justice in the relationship of State and Federal Courts.

II. Where, after one Federal decision, *as to a matter of local law,* a supervening decision by the highest State Court in direct relation to the matter creates a new situation and establishes such State law, then such supervening State decree should be given effect by the Federal Court, regardless of its own prior decision to the contrary, *as to a matter of local law. Blair vs. Commissioner,* 300 U. S., p. 9.

III. Where a Federal Court had rested its judgment solely upon a State decree, and an order of affirmance by the highest State Court, and when subsequently the highest State Court has adjudged such decree to have been wrong and has invalidated it because of fraud, the issue as to whether such decision by the highest State Court can not in any event have any effect upon the Federal judgment in the Federal Court which rendered it, is of national importance. This Court has uanimously ruled that under such circumstances the Federal judgment is not an estoppel in the Federal Court, which rendered it. *Deposit Bank vs. Frankfort,* 191 U. S. 499. The Court below has ruled to the contrary.

IV. A clear distinction between

(a) the finality and supremacy of State decisions as to matters of local law; and

(b) the finality and supremacy of Federal decisions as to matters of Federal law

and the method of obtaining the supremacy of each, by each following a supervening decision of the other within the ambit of the jurisdiction and supremacy of such other, as opposed to its own prior decisions on such matters, is of national importance.

V. This Court has granted certiorari in *Gorman, City Treasurer, vs. Washington University,* No. 711. There the question presented, in the light of the supremacy of State decisions, *as to matters of local law,* established by *Erie R. R. vs. Tompkins, is*: whether a State Court has violated that principle by disregarding its own first decision (a State decision) as to local law, and by following a Federal decision—an old decision of this Court—opposed to its own first State decision, as to a matter of local law.

Here the question presented, in the light of said principle, is: whether a Federal Court has violated that principle by disregarding a State decision as to local law, and by following its own former Federal decision, as opposed to a supervening State decision to the contrary, as to local law.

VI. The issue as to the conclusiveness of a Federal judgment, which had rested solely upon a State decree, after such underlying and basic State decree had been invalidated for fraud, by the highest Court of that State, is of national importance.

VII. The Court below sitting in Equity has a) sustained a title asserted by Respondent, which title is founded upon fraud and is, therefore, utterly void because of fraud, under the law as declared by this Court, and b) sitting in Equity, has given to Respondent the benefit of an unjust decree.

VIII. The Court below has sustained as res adjudicata a State decree, after the highest Court of that State has established that such decree had been the result of fraud, and even though the establishment of fraud in obtaining a decree renders it void *ab initio* and, therefore, without any effect as an estoppel.

IX. When the sole foundation of a Federal judgment is a former decree, and when subsequently the former decree has been reversed or set aside, the question whether the dependent judgment, which was based upon it, is not also rendered nugatory, and whether both are not vitiated by the common error is of national importance.

X. The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

XI. The majority decision below conflicts with decisions of other Courts of Appeals and with the prior decisions of the Eighth Circuit itself, and with the decisions of this Court.

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court, and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

PAUL BAKEWELL, JR.,
St. Louis, Missouri,
Counsel for Petitioner.

I hereby certify that the foregoing petition, in my opinion, is well founded, and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

Paul Bakewell, Jr.,
Counsel for Petitioner.

BRIEF AND ARGUMENT.

ERRORS RELIED UPON.

The majority of the Court below erred:

A.

In ruling in direct conflict with the decision of the highest Court of Missouri as to a matter of local law.

B.

In violating the principle of the finality and supremacy of State decisions as to local law.

C.

In holding that a supervening State decision, which has established fraud in a State decree, and thereby rendered the same void, can not in any event affect the binding force and effect of a Federal judgment, which had rested on said State decree as its sole foundation.

D.

In giving full effect to a State decree after the State Courts had invalidated the same decree because of fraud.

E.

In holding that a decree, which perverts the purpose of the suit in which it appears, is valid and binding in Equity.

F.

In holding that even though a State decree be wrong, nevertheless, a party may have full benefit of such wrong and unjust decree in a Court of Equity.

G.

In holding, contrary to the law of Missouri:

(a) that Petitioner had "rights" at the time of the will construction suit, although life estates were then in existence and the future interests were then contingent, both as to events and as to the parties who will take the same;

(b) that Petitioner had been negligent in failing to protect her "rights" in said will construction suit; and

(c) that such negligence deprived Petitioner of her right to recover property, which did not vest in her until years after the said will construction suit had been determined.

H.

In holding that a matter covered by a provision of a decree of a trial Court in an Equity suit has been conclusively settled when the Appellate Court, which rendered the final decision in said cause, had not ruled upon such matter and had not intended to settle or decide it, and when it had not even been called to the attention of that Court.

ARGUMENT.

I.

The principle of uniformity within a State between State and Federal Courts, as to a matter of local law, has been established by *Erie R. R. vs. Tompkins,* 304 U. S., pp. 74-77.

A fact established by the highest State Court is conclusive and controlling on a Federal Court. *Stoner vs. New York Life Company,* 311 U. S. 464; *Helvering vs. Rhodes Estate,* 117 Fed. (2d) 509 (8th Cir.).

The Supreme Court of Missouri established the facts; adjudged them to constitute fraud; and decided that the decree, which had resulted therefrom had constituted a fraud upon the rights of the other remainderman. Her rights were identical with those of Petitioner.

II, III and IV.

Where, after the first Federal decision, which had rested on local law, the supervening decision by the Supreme Court of Missouri in direct relation to the matter created a new situation and established such local law, such supervening decision, *as to such local law,* was final and conclusive and should have been given effect by the Federal Court, as opposed to its own former decision, *as to a matter of local law. Blair vs. Commissioner,* 300 U. S., p. 9; *Messenger vs. Anderson,* 225 U. S., p. 444.

The finality and supremacy of State decisions as to local law has been established by *Erie R. R. vs. Tompkins,* supra, and by multiple decisions which followed it.

The corresponding finality and supremacy of Federal decisions as to Federal law—Federal questions—is equally well established. *Tait vs. Railroad,* 289 U. S. 620; *Deposit Bank vs. Frankfort,* 191 U. S. 499; *Cohens vs. Virginia,* 6 Wheaton 204.

The principle was stated thus in the *Frankfort* case:

> "The same reasoning which permits to the States the right of final adjudication upon purely state questions requires no less respect for the final decisions of the Federal courts of questions of national authority and jurisdiction" (191 U. S., p. 517).

In order to make effective the finality and supremacy of State decisions, *as to matters of State law,* this Court has specifically decided that where, after one Federal judgment, as to a matter of State law, a supervening decision by the highest State Court had ruled to the contrary, the Federal Court, in further litigation, must follow the supervening State decision, as opposed to its own former decision to the contrary. *Blair vs. Commissioner,* 300 U. S., p. 9; *Messenger vs. Anderson,* 225 U. S., p. 444.

In order to make effective the finality and supremacy of Federal *decisions as to Federal law,* this Court has constantly ruled that a matter of Federal law finally adjudicated in the Federal Courts can not be impaired by State decisions. *Tait vs. Railroad,* 289 U. S. 620; *Deposit Bank vs. Frankfort,* 191 U. S. 499; *Stoll vs. Gottlieb,* 305 U. S., p. 170.

The ruling in the *Blair* and *Messenger* cases, *supra,* protected the supremacy and finality of State decisions as to State law.

The ruling in the *Tait* and *Frankfort* cases, *supra,* protected the supremacy and finality of Federal decisions as to Federal law.

The two distinctly different rulings, applicable to two distinctly different situations, are examples and illustrate how State decisions as to State law become supreme in Federal courts and how Federal decisions as to Federal law become supreme in State Courts.

The two distinctly different rulings are necessary in the

two distinctly different situations in order to maintain the principle and to make it effective.

If a Federal Court may follow its own previous decision, as to a matter of local law, as opposed to a supervening State decision to the contrary, the principle of finality and supremacy of State decision as to local law becomes a myth.

This Court has recognized the distinction between the two different rulings. See *Blair vs. Commissioner,* 300 U. S., p. 9. There a Federal judgment had rested on State law. A supervening decision by the State Court had changed the situation. It was contended that under the *Tait* case and under the *Frankfort* case the former Federal decision was binding. This Court said briefly:

> "We think that the ruling in the Tait case is not applicable."

The opinion does not state the reason *why* such ruling was not applicable.

The reason that the ruling in the *Tait* and *Frankfort* cases "was not applicable" to the situation in the *Blair* case must be because of the supremacy and finality of State decisions as to State law, and because that supremacy and finality must be maintained.

The reason for the two different rulings in two distinct situations is of national importance in the proper relationship between Federal and State Courts in the establishment and maintenance of the finality and supremacy of each judiciary within its proper sphere.

The holding by the Court below that the binding effect of a former Federal decision, *as to a matter of local law,* could not in any way be affected by a supervening decision of the highest State Court as to a matter of local law, which State decision changed the situation—a State decision which had invalidated a State decree, which State decree had been the sole support for the Federal judgment, is contrary to the law as declared by this Court.

The citation by the Court below of the *Tait* and *Frankfort* decisions in support of its ruling, clearly demonstrates a failure on the part of the Court below to distinguish between the two different rulings applicable to two different situations.

An explicit statement by this Court of the *reason why* this Court decided in the *Blair* case "the ruling in the Tait case is not applicable" (300 U. S., p. 9) seems necessary.

Such an explicit statement by this Court would compel a decision that the ruling in the *Tait* case and in the *Frankfort* case is not applicable to the instant case, because the principle of those cases is limited to the finality of Federal decisions as to Federal questions. See *Stoll vs. Gottlieb*, 305 U. S., p. 170.

To carry into effect the finality and supremacy of State decisions as to local law, Federal Courts give to decrees of State Courts *only* the effect which is given to them by the Courts of that State. *Wright vs. Georgia R. R.*, 216 U. S., p. 429; *Covington vs. First National Bank*, 198 U. S. 100.

In the *Covington* case the Court said that the case of *Deposit Bank vs. Frankfort* had been only concerned with the effect to be given to a Federal judgment when pleaded in a State Court (p. 109).

It then said:

> "We are now dealing with the weight to be attached to a state judgment when pleaded as res judicata in a Federal court. That was the very question decided by this court in the case of Union & Planters' Bank v. Memphis, 189 U. S. 71, wherein it was held that the Federal courts were not required to give to such judgments any greater force or effect than was awarded to them by the courts of the State where they were rendered. Upon this branch of the case the question then is, What effect is given in the courts of Kentucky to such pleas of estoppel?" (p. 109.)

Under the decisions of this Court, the Court below should not have given to the decree of the State Court any greater effect than was given it by the Supreme Court of Missouri, and the Supreme Court of Missouri invalidated it.

V.

This Court has granted certiorari to review a decision by the highest Court of Missouri. *Gorman, City Treasurer, vs. Washington University,* No. 711.

There the basis for the petition was that the Supreme Court of Missouri had violated the principle of the supremacy of State decisions, *as to matters of local law,* established by *Erie R. R. vs. Tompkins,* supra.

In an early tax case the Supreme Court of Missouri had decided that the charter of Washington University had not constituted a contract—a matter of local law. On review, this Court held to the contrary and reversed the Supreme Court of Missouri *on a matter of local law.*

Subsequently, this Court established the principle of supremacy and finality of State decisions as to local law. *Erie R. R. vs. Tompkins,* supra.

Thereafter, in a later tax case, the Supreme Court of Missouri held that it was bound by the decision of this Court in the first case.

This Court was asked to review such holding by the Supreme Court of Missouri on the ground that that Court had erred in following a former Federal decision (a decision by this Court) as to a matter of local law, instead of following its own earlier decision, as to such local law, which had been to the contrary.

This Court was also asked to review its own decision in the first case in the light of the principle established in *Erie R. R. vs. Tompkins.*

The writ was granted.

That case presents for decision:

(a) What effect is a State Court to give to a former Federal decision, as to a matter of local law, as opposed to its own decision, as to local law, which was to the contrary?

(b) What effect will this Court give to its own former decision on a matter of local law, which was contrary to the decision of the highest State Court, in view of the supervening decision by this Court, which establishes the finality and supremacy of State decisions as to local law?

The instant case presents for decision: What effect may a Federal Court give to its own former decision as to a matter of local law, which decision is contrary to a supervening decision by the highest State Court, in view of the finality and supremacy of State decisions as to local law?

The principles applicable to Cause No. 711 should affect the instant case, entirely apart from the fact that here the underlying State judgment, which had supported the first Federal judgment, and which the Federal Court had accepted as the local law, had been the result of fraud.

VI, VII and VIII.

Public policy demands that there be an end to litigation; it also demands that the integrity of judicial action remain inviolate.

Which rule of public policy shall prevail when they come into conflict?

A three-Judge Federal Court set aside the infamous insurance compfomise in Missouri. The opinion was written by presiding Judge Stone of the Eighth Circuit in *American Insurance Company vs. Ray B. Lucas et al.*, 38 Fed. Supp. 926, and said in part:

"This brings into direct conflict two established rules of public policy. One is the desirability of final-

ity of decrees after the entry term, based upon the public policy that there should be an end to litigation. The other is the protection of the integrity of judicial action, based upon the public policy that courts of justice must not be used as instruments to effectuate frauds or injustices.

"One of these rules must give way to the other. We can think of no rules of public policy attaching to the judiciary of equal importance to those which protect the integrity of the exercise of judicial power. * * *

"* * * We believe it is more essential to preserve the integrity of the Courts than to terminate particular litigations. So long as there remains anything which a court can do in a particular litigation to protect its integrity, we think it has the power to act: provided only, that such action is based upon a full opportunity for hearing by all interested parties.

"* * * In applying the 'clean hands' maxim the Court is concerned primarily with protecting its own integrity from improper action by a party. * * * The latter [the maxim of 'clean hands'] need not be even pleaded; may come to the attention of the court in any way; and the court will act *sua sponte* * * *. Even when the matter is brought to the attention of the court by a pleading, the court acts 'not out of any regard for the defendant who sets it up, but only on account of the public interest' (McMullen vs. Hoffman, 174 U. S. 639, 669).

* * * * * * *

"* * * 'that there is and can be no law or practice which would compel a * * * court of bankruptcy or any other court to become a party to a fraud' (Zeitinger vs. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719, 722)" (38 Fed. Supp., pp. 931, 932, 934 and 935).

The opinion below has sustained a plea of res adjudicata and by doing so has violated the integrity of judicial

action. A review by this Court of the decision below is of national importance in the protection of the integrity of judicial action lest, under the cloak of res adjudicata, Courts are to become instruments for the perpetuation of fraud and injustice.

> "Fraud will vitiate everything, even the most solemn transactions; *and an asserted title to property, founded upon it, is utterly void*" (*U. S. vs. The Amistad*, 15 Peters, p. 594).

In violation of that principle, the Court below has sustained a title asserted by Respondent, which is founded solely upon

> (a) the decree in the will construction suit, which is void because of fraud; and
> (b) a judgment at law of the Federal Court, which judgment itself had rested solely upon such State decree, which State decree has subsequently been invalidated because of fraud, and was, therefore, void.

Under the decisions of this Court, fraud vitiates everything.

Under the law of Missouri, where a decree has been obtained by fraud, it is void, and when fraud in obtaining such decree has been established, any estoppel of such decree vanishes. *Wagoner vs. Wagoner*, 287 Mo. 567, 229 S. W. 1064; *Howard vs. Scott*, 225 Mo., p. 711.

Even the decision, which had been erroneously relied upon by the Court below as a reason for its ruling, to wit, *Deposit Bank vs. Frankfort*, 191 U. S. 499, has no application where the underlying and basic judgment had been the result of fraud.

The opinion in the *Frankfort* case carefully and explicitly excluded from the effect of the decision a situation where the basic and underlying judgment had been the result of fraud.

The opinion states that the doctrine of estoppel by judgment is founded on "a judgment or decree *lawfully* rendered" (191 U. S., p. 510).

The opinion sustains the estoppel of a judgment "*unless it was shown that the judgment relied upon was obtained by fraud*" (191 U. S., p. 511).

Said opinion cited and followed *Crescent City Live Stock Company vs. Slaughter House Company,* 120 U. S. 141, where this Court ruled that nothing can be permitted to destroy the effect of a judgment "*except fraud in procuring the judgment itself*" (120 U. S., p. 159).

Thus the decisions of this Court have carefully and explicitly refused to give any effect as an estoppel to a Federal judgment which rests solely upon a judgment which had been the result of fraud.

In the instant case the first Federal judgment rested solely upon a State decree.

A subsequent decision by the Supreme Court of Missouri has established that such State decree had been the result of fraud.

That decision vitiated the basic judgment and must vitiate and render nugatory the dependent Federal judgment, unless "fraud is to find shelter in the decrees of courts" (287 Mo. 567).

IX.

When the sole foundation for a judgment is a former decree, and when such former decree has been reversed or set aside, the dependent judgment is rendered nugatory—both are vitiated by the common error.

That is both reason and law. *Butler vs. Eaton,* 141 U. S. 240; *Chicago & Vincennes R. R. vs. Fosdick,* 106 U. S., p. 84; *Ballard vs. Searls,* 130 U. S., p. 54.

Such is the law in Missouri. *Overton vs. Overton,* 327 Mo. 530, 37 S. W. (2d), p. 568.

In *Butler vs. Eaton,* this Court said:

> "The judgment complained of is based directly upon the judgment of the Supreme Judicial Court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object?" (141 U. S., pp. 243-44).

In those cases the basic and underlying judgment had been reversed or set aside. For that reason, this Court said that the whole foundation for the judgment was without valid force or effect and ought never to have existed.

Furthermore, the Court below ruled that nothing in the decision by the Supreme Court of Missouri, which invalidated the State decree for fraud, could affect in any way the force and effect of the judgment of the Federal Court in the action at law, and in support of that ruling relied upon *Deposit Bank vs. Frankfort.*

The *Frankfort* decision shows that a Federal judgment, which rested upon a State decree, subsequently reversed, is not conclusive *in the Federal Court, which had rendered such dependent judgment.*

The majority opinion in the *Frankfort* case held that, after reversal of the supporting judgment, the dependent judgment remained as an estoppel *in Courts other than the Court which had rendered it.*

But the same majority opinion ruled that the Court *which had rendered* such dependent judgment *could set it aside* after reversal of the supporting judgment. The opinion said:

> "There the court [which had rendered such judgment] may reconsider and set aside or modify its judgment upon seasonable application" (p. 512).

The minority opinion did not dissent from that ruling.

The minority held that after reversal of an underlying judgment the dependent judgment could not constitute an estoppel in any Court.

The minority opinion said that with the reversal of the underlying judgment "the ground on which that decree rested had been swept away," and, therefore, ruled that the dependent judgment was not an estoppel *in any Court.*

The four Judges, constituting the minority who dissented, dissented only from the ruling of the majority, because the majority held that after reversal of an underlying decree, the judgment which had depended thereon itself constituted an estoppel in a Court *other than the Court which had rendered it.*

Therefore, under the express decision of this Court, the same Federal Court which had rendered the judgment at law in *Perry vs. Wiggins,* based solely upon the decree in the State Court, could have set aside its own judgment after the Supreme Court of the State had subsequently set aside or reversed the underlying and basic State decree.

Such decision is based upon principle:

> "* * * where a judgment was based upon a previous judgment, and the latter was subsequently reversed or set aside, it was held that relief might be obtained from the second judgment *by motion to vacate it*" (*Freeman on Judgments,* Vol. 1, Sec. 199).

That principle has been applied in *Heckling, Ex., vs. Allen,* 15 Fed. 196.

But, in direct conflict with that specific decision by this Court, the majority below ruled that the subsequent decision by the Supreme Court of Missouri, invalidating the

State decree for fraud, could not, in any event, affect in any way the judgment at law in *Perry v. Wiggins,* which had rested solely on such State decree.

Here the Supreme Court of Missouri had done more than reverse the underlying State decree—it had invalidated the same for fraud and had thereby established that such decree had been void *ab initio.*

Petitioner here followed the procedure stated by this Court in the *Frankfort* case.

Petitioner suggested to the Court below that it direct the District Court to vacate said judgment at law, or to direct the District Court to permit the filing of a proceeding to vacate that judgment, either by motion or by a separate suit in Equity (R., p. 332).

Petitioner's suggestion to vacate said judgment at law necessarily could not have been made until after the Supreme Court of Missouri had invalidated the State decree for fraud.

Since the Federal judgment at law had been affirmed by the Court of Appeals (the Court below), Petitioner could not apply to the District Court without leave of the Court of Appeals. *Ballard vs. Searls,* 130 U. S., p. 55.

The Court below, however, disregarded such suggestion.

The dissenting opinion below had said that the Court certainly had the right to declare their judgment at law nugatory under the circumstances, or to allow any pleading amendment that might be necessary to achieve that result.

X.

1) The Court below has sustained a State decree, which the highest State Court decided had been the result of fraud and had been a fraud upon the rights of a contingent remainderman.

2) The Court below has sustained a decree, which is a legal perversion. It perverts justice. It perverts the very purpose of the suit in which it appears. That suit was filed

"to give full effect to the intent." The decree defeats that intent as it was stated by the highest State Court in the same case, and also as that intent was expressly decided by that Court in a later companion case.

3) The Court below has not only sustained such decree itself, but has also sustained a Federal judgment, which was dependent and rested solely upon said decree.

4) Thereby the Court below has given substance and full effect to a mere nullity—a decree which has been rendered void for fraud by the decision of the very Court which had unwittingly affirmed said decree—and, as shown by the opinion of that Court, it had affirmed the decree because of the statements and representations of counsel as to the intention of the testator, and because of the omissions of counsel to inform that Court of the provision in the decree which had contradicted that intention.

5) The Court below, sitting in Equity, allows Respondent to hold property under such void decree, although it admits that the decree is wrong and it accepts the decisions by the Supreme Court of Missouri that Petitioner had become the owner of that property in 1928.

6) Sitting, therefore, as a Court of Equity, the Court below permits a voided decree to shield one who has no claims to property against the claims to that property by the owner thereof as established by the law of the State.

The Respondent pleaded in this case in Equity a decree and a judgment, both of which were wrong, and which worked an injustice.

Under the decisions of this Court, a party in Equity may not have any benefit from a decree which is wrong or which does an injustice. *Gay vs. Parpart,* 106 U. S. 679; *Lawrence Manufacturing Co. v. Janesville Mills,* 138 U. S., p. 561; *Lewers & Cooke vs. Atcherly,* 222 U. S., p. 294. In those cases this Court established and laid down for the United States the principle known in England as Lord Redesdale's

Rule, to wit, that where a party is in a Court of Equity claiming the benefit of a former decree, the Court will not lend its aid where it is manifest that the elements of either injustice, mistake, surprise or misapprehension had been present.

IF THIS CASE WERE IN THE COURTS OF MISSOURI, PETITIONER WOULD RECOVER.

The Supreme Court of Missouri has decided that the property vested absolutely in her in 1928; that the State decree to the contrary is wrong; that such wrong decree resulted from fraud.

Under the law of Missouri, a decree obtained by fraud is void and any estoppel thereof vanishes. *Wagoner vs. Wagoner,* 287 Mo. 567; *Howard vs. Scott,* 225 Mo., p. 711.

Under the law of Missouri, where a judgment which was wrong had resulted from accident, mistake or fraud, and where such wrong judgment had been the basis and foundation of a second or dependent judgment—a judgment at law—and such dependent judgment had been affirmed by the highest State Court, the Courts of Missouri will grant relief in Equity against the first underlying judgment which was wrong, and will disregard the second or dependent judgment, which had rested upon the first erroneous judgment. *Overton vs. Overton,* 327 Mo. 530, 37 S. W. (2d), p. 569.

That decision was specific and held that the plaintiff there was entitled to relief in Equity from the first erroneous judgment which had resulted from accident, mistake or fraud, and that the judgment at law, which had rested solely upon it, was not res adjudicata.

The same decision establishes that under the law of Missouri:

(a) a party will be relieved from the consequences of accident, fraud or mistake, unless such party had

been culpably negligent and that culpable negligence means "the violation of a positive legal duty"; and

(b) that even a clearly established negligence may not defeat relief from fraud, accident or mistake if the other party has not been prejudiced thereby (327 Mo. 530).

Petitioner here was not negligent in failing to appear in the will construction suit.

At that time she had no right and no estate, but merely a possibility of acquiring thereafter a future interest, which was then contingent.

Under the law of Missouri, a prospective contingent remainderman has no standing in Court to obtain an adjudication as to future interests which may never vest in him. The law prohibits such a premature adjudication of a nonexistent right, and one which may never come into existence. *Shaller vs. Mississippi Valley Trust Co.,* 319 Mo. 128; *Bradley vs. Goff,* 243 Mo., p. 103; *Lich vs. Lich,* 158 Mo. App., p. 425.

In holding that the Petitioner could not recover, the Court below ruled contrary to the law of Missouri, which is controlling.

XI.

The final decision in the will construction suit was rendered by the Supreme Court of Missouri. That Court did not rule upon the title here involved.

The Court below said:

"That the Supreme Court of Missouri did not rule on these questions would not affect the conclusiveness of the decree" (R., p. 292).

That ruling conflicts with the ruling of the Sixth Circuit in *Westinghouse Electric Mfg. Co. vs. Wadsworth Electric Co.,* 51 Fed. (2d) 447.

It conflicts with the ruling of the Second Circuit in *Moran Towing Co. vs. Navigazione etc.,* 92 Fed. (2d), p. 40.

It conflicts with a previous ruling by the Eighth Circuit itself in *Great Northern Ry. Co. vs. Gen. Ry. Signal Co.*, 57 Fed. (2d), p. 461, where the Court said:

> "*Only* the questions which the *Appellate Court* had before it *and which were considered and intended to be decided* would be settled by the decree" (p. 461).

This Court has decided:

> "If the pleadings and the *opinion* of the court show that any portions of the prior decree went beyond the issues litigated, the court in the subsequent suit *limits the binding effect of this decree to the questions which were actually presented to the court for decision*" (*Oklahoma vs. Texas*, 256 U. S., p. 78).

Since the Appellate Court renders the final decision in any Equity case, the binding force and effect of a decree is limited to matters which were decided by the Appellate Court. *Van Fleet's Former Adjudications*, Vol. II, p. 632, Sec. 283; Vol. I, p. 124, Sec. 27.

But over and beyond the conflict of decision as to the particular point involved in the respective cases, it is clear that nothing said in any one of the opinions in said cases can control the situation here present.

The opinion below overlooks the following facts, which go to the roots of Justice and raise a question of common honesty and fair dealing, to wit:

Mrs. Wiggins brought the suit to construe the will.

In that case in the Circuit Court counsel for Mrs. Wiggins agreed to the paragraph of the decree which directed that on the death of a daughter one-half (½) of her one-third (⅓) should go to each of her surviving sisters for life, *and on the death of either*, should go to the *survivor* for her life, and upon the death of the *last survivor*, then to contingent remaindermen (Phys. Ex., p. *522).

On appeal, counsel for Mrs. Wiggins told the Supreme

Court of Missouri that the testator intended that the portion of a daughter dying without issue should go

> "to the survivors of the daughters, again with remainders over to the *heirs of their bodies.*"

The Supreme Court of Missouri has so stated (R., p. 365).

Counsel for Mrs. Wiggins did not advise the Supreme Court that the paragraph in the decree of the Circuit Court had contradicted that intention. The Supreme Court has so found (R., p. 369).

In this case counsel for Mrs. Wiggins states in her answer herein:

> "* * * appellants * * * upon said appeal, * * * did not present to the State Supreme Court * * * the question as to the correctness in fact and law of the provision of said decree" (R., p. 24).

He further states in said answer that no one

> "had presented to the State Supreme Court for review and decision by it, the question whether that part of the decree of the State Circuit Court which gave to the two surviving sisters of Cora B. Fowler, successive life estates * * * was or was not correct * * *" (R., p. 24).

His answer further states:

> "inasmuch as the decree of the State Circuit Court had held that if one daughter died without issue, leaving two sisters surviving, *the latter would take successive life estates, the daughters (appellants) had no desire to have that provision reviewed or altered*" (R., p. 33).

Counsel for Mrs. Wiggins has argued that such paragraph is conclusive because it was not presented to the Supreme Court in the will construction suit and simul-

taneously argues that it was not presented to the Supreme Court because Mrs. Wiggins and her sisters did not wish to have it reviewed or altered, because it gave to them "successive life estates," although the same counsel told the Supreme Court that the testator intended to the contrary.

The majority of the Court below sustain that contention and do so after the Supreme Court of Missouri has said:

> "No judge, by reading the briefs in the will construction suit appeal, would even *suspect* such a construction as that contained in the challenged paragraph of the decree" (R., p. 366);

and has also stated:

> "the briefs would suggest that no such construction was made, * * *" (R., p. 366).

Such construction has been branded by the Supreme Court of Missouri as being "untenable" and as being "contrary to all the rules of construction" and that "no word juggling as to remainders, etc., can, in reason, reach such result."

Under these peculiar facts, a ruling that the decree of the trial Court is conclusive, when it contradicts the statements in the opinion of the Supreme Court, and when such paragraph was not presented to the Supreme Court because the appellants did not wish to have the same reviewed by that Court, sanctions and approves the making of erroneous representations by a party to the highest Court of a State in an equity case.

Such can not be the law in any Court and if any opinion of any Federal Court sustains such a proposition as the law, we submit that this Court, in its supervisory power to administer Justice, will rule to the contrary.

CONCLUSION.

The facts have been established by the Supreme Court of Missouri. Its decisions settle the applicable local law.

In lieu of further brief or argument, we refer to the decision by the highest Court of Missouri in the companion case of *Kennard vs. Wiggins.*

The decisions of this Court establish the finality and supremacy of State decisions as to matters of local law.

The accident of diversity of citizenship should not disturb the equal administration of Justice in co-ordinate State and Federal Courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a State, upon which the *Tompkins* decision is based. *Klaxon Co. vs. Stentor Co.,* 313 U. S., p. 496.

Petitioner, therefore, respectfully urges this Court to grant the Petition herein so that your Petitioner may recover the property which the highest Court of Missouri said vested absolutely in her in 1928, and recover the same from Respondent, whose asserted title thereto rests solely upon a decree, which the highest Court of Missouri has established had been the result of fraud, and had been a fraud upon the rights of a contingent remainderman, whose rights were identical with those of this Petitioner.

Petitioner prays that a writ of certiorari be issued to the Circuit Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this Court, and the judgment of the Court below reversed.

PAUL BAKEWELL, JR.,
St. Louis, Missouri,
Counsel for Petitioner.

With him on Brief:
JOHN E. CRAMER, JR.,
CLAUDE I. BAKEWELL,
St. Louis, Missouri.